Supreme Court, U.S.
FILED
NOV 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-652

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

ALBERTA GAS CHEMICALS LIMITED and
ALBERTA GAS CHEMICALS, INCORPORATED,
*Petitioners,*

v.

E. I. DU PONT DE NEMOURS AND COMPANY,
DUPONT HOLDINGS, INC. and CONOCO INC.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

*Of Counsel*
RICHARD H. REA
BERNARD J. REILLY
E. I. du Pont de Nemours & Company
Tenth & Market Streets
Wilmington, Delaware 19898
(302) 774-2117

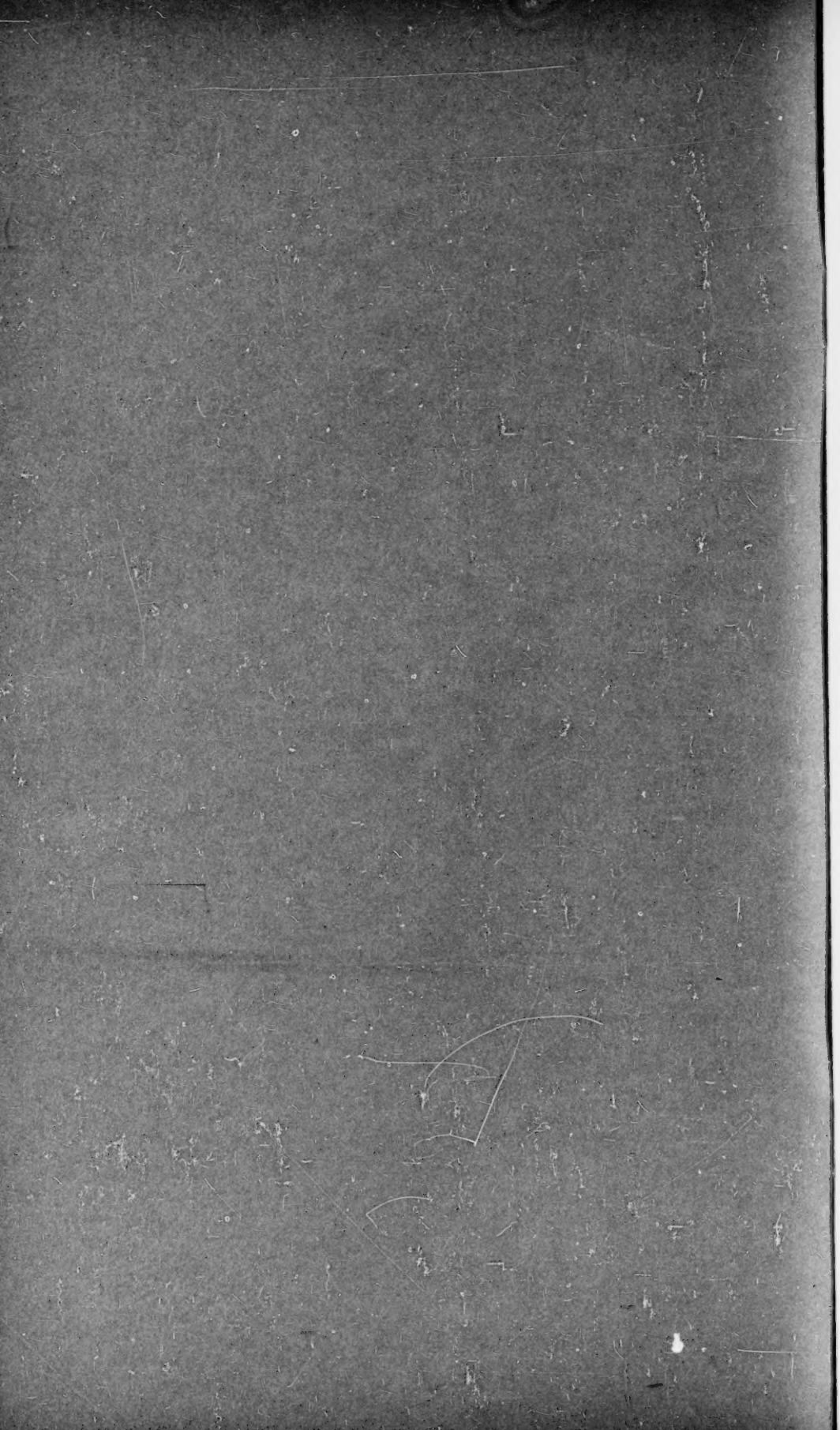
MARJORIE A. WILHELM
Conoco Inc.
5 Greenway Plaza East
P.O. Box 2197
Houston, Texas 77001
(713) 293-3400

DANIEL M. GRIBBON *
HENRY P. SAILER
WILLIAM H. ALLEN
CAROLYN F. CORWIN
DOUGLAS R. DAVIES
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

THOMAS L. MORRISSEY
JOHN P. DWYER
Carpenter, Bennett & Morrissey
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-7711

*Counsel for Respondents*

* Counsel of Record



## QUESTIONS PRESENTED

Petitioners were competitors of Du Pont in the production and sale of methanol. They sued to enjoin Du Pont's 1981 acquisition of Conoco and to recover damages on the ground that the acquisition violated Section 7 of the Clayton Act. Conoco has at no time been a producer of methanol; at the time of the acquisition it purchased methanol in small quantities. Petitioners' theory is that if Conoco had not been acquired it would have become a producer of methanol for use as fuel and prior to so doing would have created a short-term shortage of the product, enabling petitioners to increase their prices and profits from the sale of methanol. The questions presented are:

1. Whether the injury petitioners assert is of the kind the antitrust laws were intended to prevent.

2. Whether the increased purchases that Conoco supposedly would have made in the circumstances petitioners allege should be considered in determining whether the acquisition constituted a forbidden vertical foreclosure of Conoco's methanol purchases.

3. Whether petitioners' allegations, even if proven, establish a right to injunctive or other equitable relief.

## PARTIES TO THE PROCEEDINGS

The names of all parties in the district court and the court of appeals are listed in the caption. Respondent E.I. du Pont de Nemours & Company ("Du Pont") has the following publicly-held subsidiary or affiliated companies: Du Pont Canada, Inc.; Thapar-DuPont Limited; TVS Du Pont Electronics Ltd.; Biotech Research Laboratories, Inc.; Molecular Biosystems Inc.; and Conoco Exploration Limited. Though it is not a parent company, subsidiary or affiliate of Du Pont, the Seagram Company, Ltd. (through wholly-owned subsidiary companies) owns approximately 22 percent of Du Pont's common stock.

TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Parties to the Proceedings | ii |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statute Involved | 2 |
| Statement | 2 |
| 1. The Parties | 2 |
| 2. The District Court Proceedings | 5 |
| 3. The Court of Appeals Decision | 6 |
| Argument | 7 |
| Conclusion | 16 |

## TABLE OF AUTHORITIES


CASES: Page

*Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) ---- 8

*Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ---- 6, 8, 9, 10

*Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 107 S. Ct. 484 (1986) ---- 12, 13, 14

*Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir.), *cert. dismissed*, 469 U.S. 1200 (1985) ---- 14

*Cia. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985) ---- 14

*Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348 (1986) ---- 15

*United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974) ---- 10

STATUTES:

Clayton Act

Section 4, 15 U.S.C. § 15(a) ---- 2, 10, 12

Section 7, 15 U.S.C. § 18 ---- 2, 5

Section 16, 15 U.S.C. § 26 ---- 2, 12

Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a ---- 5

MISCELLANEOUS:

U.S. Dep't of Energy, Energy Information Administration, *1980 Annual Report to Congress, Volume Three: Forecasts* (1981) ---- 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

---

No. 87-652

---

ALBERTA GAS CHEMICALS LIMITED and
ALBERTA GAS CHEMICALS, INCORPORATED,
*Petitioners,*

v.

E. I. DU PONT DE NEMOURS AND COMPANY,
DUPONT HOLDINGS, INC. and CONOCO INC.,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A45) is reported at 826 F.2d 1235. The opinions of the district court (Pet. App. B1-B12, C1-C6) are unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. D1) was entered on August 17, 1987. A petition for rehearing en banc was denied on September 10, 1987. (Pet. App. E1.) A petition for a writ of certiorari was filed on October 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Sections 4, 7 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a), 18 and 26, are reproduced at Pet. App. F1-F2.

## STATEMENT

1. *The Parties*—Petitioner Alberta Gas Chemicals Limited (AGCL) is the largest producer of methanol in Canada (Pet. App. A3) and one of the largest in the world. AGCL sells methanol in the United States through its wholly-owned subsidiary, petitioner Alberta Gas Chemicals, Inc. In 1981 AGCL operated two methanol plants located in Medicine Hat, Alberta. Since 1981, AGCL has opened a third world-scale methanol plant at Medicine Hat. (C.A. App. A3213, A3215.)[1] Each of AGCL's plants produces methanol from natural gas, the most common methanol feedstock. (See Pet. App. A3, A4.)

Respondent E. I. du Pont de Nemours and Company is a producer of numerous chemicals and chemical products. One such chemical product is methanol. At the time it acquired Conoco in 1981, Du Pont operated two methanol plants, one located at Beaumont, Texas, and the other at Deer Park, Texas. Du Pont consumed approximately half of the methanol produced at those plants and sold the balance in the merchant market. (Pet. App. A3.) The Beaumont plant used natural gas as its feedstock; the Deer Park plant used residuum oil. Since 1985 Du Pont has not produced methanol for sale in the merchant market.[2] (C.A. App. A140-A145.)

---

[1] "C.A. App." refers to the joint appendix filed in the court of appeals.

[2] In the fall of 1985 Du Pont concluded an agreement to transfer its Deer Park complex (including the Deer Park methanol plant) to the USI Division of National Distillers, Inc., its former partner at Deer Park. That transfer took place on January 1, 1987. One-half of the capacity of Du Pont's remaining plant at Beaumont is used to satisfy Du Pont's internal methanol needs. The remainder

The great bulk of the methanol produced in the United States and world-wide is used in the manufacture of other chemicals, such as formaldehyde and acetic acid. Small amounts are used for fuel purposes. (Pet. App. A3; C.A. App. A9, A680-A684.)

Respondent Conoco Inc. produces and markets petroleum and natural gas products and, through its subsidiary Consolidation Coal Company, mines and sells coal. (Pet. App. A3.) Conoco is not and never has been a producer of methanol. At various times in the past it studied the feasibility of using its coal reserves to make synthetic fuels, including methanol.[3]

In the late 1970's and at the very beginning of the 1980's, crude oil prices rose rapidly, and there was an expectation that they would continue to do so.[4] As a result, it appeared for a time that the use of coal to produce synthetic fuels might become commercially attractive. Some within Conoco thought at this time that, as petroleum prices rose, the use of methanol as a substitute for gasoline and other petroleum products was likely to develop and that coal-based methanol plants would become economically attractive.[5] Other companies had sim-

---

of that plant's capacity is used to produce methanol for another company pursuant to a tolling arrangement. (C.A. App. A140-A145, A3217-A3219.)

[3] C.A. App. A3266-A3279; CON 80000110, pp. 1, 12-14. Copies of documents and excerpts of deposition transcripts cited in this statement were made part of the record by the stipulation and order signed by the district judge on September 29, 1986.

[4] *See, e.g.*, U.S. Dep't of Energy, Energy Information Administration, *1980 Annual Report to Congress, Volume Three: Forecasts* 10 (1981) (predicting that the nominal price of crude oil would reach $61 per barrel by 1985, $98 per barrel by 1990, and $165 per barrel by 1995).

[5] McCleskey deposition at 48-51, 82; Sinex deposition at 49-50, 108, 112-13; CON 101573-77.

ilar ideas (including the idea of producing methanol from coal) during this short-lived vogue of synthetic fuels. (See Pet. App. A4; C.A. App. A52-A56, A1177-A1181, A1190-A1191.) Technology for the production of methanol from coal was well known and broadly available.[6]

By the summer of 1981, prior to the acquisition, the president of Conoco Chemicals commented that "[r]ecent softness in oil prices and projections of increased gas supply have put the economics of synfuels in question." (C.A. App. A5273.) Conoco's management concluded soon thereafter to discontinue work on coal-to-methanol possibilities.[7] There has been no improvement in the prospects for coal-based methanol since 1981. Crude oil prices have leveled off and then declined; large new natural gas-based methanol plants have come on stream in gas-rich countries, resulting in a worldwide methanol glut; and no significant market for the use of methanol as a fuel has developed. (Pet. App. A5; C.A. App. A57-A58, A1187-A1188, A1193-A1194, A3215.)[8]

At the time it was acquired by Du Pont on September 30, 1981, Conoco was purchasing from Du Pont and others (not including petitioners) limited quantities of methanol for use as a feedstock in chemical plants in Newark, New Jersey, and Lake Charles, Louisiana. (Pet. App. A5.) Since 1981 Conoco has closed its Newark plant and sold its Lake Charles plant. Conoco has not consumed any appreciable quantities of methanol since 1984. (*Ibid.*)

---

[6] CON 200040.

[7] Bailey deposition at 73, 102, 146-47, 165-70; McCleskey deposition at 54-55, 192-93.

[8] Conoco was not alone in deciding not to go forward with a coal-based methanol plant. Of the many coal-to-methanol projects that had been announced by mid-1981, all but one (and that one involving special circumstances) had either been cancelled or inactive for some time by 1985. (See C.A. App. A55-A58, A1181-A1188.)

2. *The District Court Proceedings*—Petitioners brought this action in the United States District Court for the District of New Jersey in September 1981, alleging that Du Pont's acquisition of Conoco, then pending, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Petitioners alleged in their complaint that the acquisition would lessen competition in the production and sale of methanol because, *inter alia*, it would eliminate the potential for competition from Conoco's coal-based methanol and would reduce competition for sales of methanol to Conoco. (C.A. App. A11-A12.) Petitioners sought both injunctive relief and treble damages. However, they did not ask for a preliminary injunction, and the acquisition was effected. (Pet. App. A5.)[9]

Du Pont moved to dismiss the action on the ground that the complaint failed to state a claim on which relief could be granted. The district court denied the motion and permitted petitioners to engage in discovery. (C.A. App. A26-A46.) Following the completion of several years of discovery, the parties prepared a joint pretrial stipulation. Petitioners, apparently recognizing the difficulty they faced in showing that, as competitors, they had been harmed by an alleged lessening of competition in the methanol business, developed a novel theory of injury for their damages claim. They asserted that in

---

[9] The Antitrust Division of the Department of Justice considered the Du Pont-Conoco acquisition in detail pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and concluded on July 30, 1981, that, with one minor exception not here relevant, the acquisition did not appear objectionable on antitrust grounds. The sole Justice Department objection related to a joint venture between Conoco and Monsanto Company in an area not pertaining to methanol. That matter was resolved by a complaint and stipulated final judgment that were filed in the United States District Court for the District of Columbia, Civ. No. 81-1837 (filed Aug. 4, 1981).

the absence of the acquisition Conoco would have gone forward with construction of a coal-based plant to produce methanol for use as fuel and that during the lengthy period of construction Conoco allegedly would have taken steps to create new demand for methanol as fuel, which petitioners claim would have resulted in a shortage in the supply available and a sharp increase in the price and volume of methanol sold, in turn raising the profits of petitioners and other existing producers.

Du Pont moved *in limine* for an order precluding petitioners from presenting at trial evidence relating to damages on the ground that petitioners' theory of demand creation, shortage of supply, higher prices, and larger profits did not satisfy the requirement of antitrust injury set forth in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The district court treated the motion *in limine* as a motion for partial summary judgment on petitioners' claims for damages. The court granted the motion as to damages allegedly arising out of the termination of Conoco's plans to produce and market methanol from coal (Pet. App. B1-B12) and invited a further motion dealing with petitioners' damages claims based on the alleged foreclosure of Conoco's methanol purchases and their claims for equitable relief (see *id.* at C2). The district court granted Du Pont's subsequent motion for summary judgment on petitioners' remaining claims because of their failure to satisfy the requirement of antitrust injury. (Pet. App. C1-C6.)

3. *The Court of Appeals Decision*—The court of appeals affirmed, one judge dissenting. (Pet. App. A1-A45.) The court of appeals agreed with the district court that the theory of damages petitioners had contrived did not satisfy the requirement of antitrust injury. (*Id.* at A13-A19.) It noted in that connection that under the circumstances of this case petitioners, as competing metha-

nol producers, were not in a position to claim injury as a result of the termination of Conoco's hypothetical coal-based plant. (*Id.* at A18-A19.)

The court of appeals also rejected petitioners' vertical foreclosure claim. The court noted that post-merger self-dealing made possible by vertical integration could result in efficiencies and that any resulting harm to competitors should not be compensable under the antitrust laws. It held that, in any event, in view of the small size of Conoco's methanol requirements at the time of the acquisition and in view of conditions in the methanol business, foreclosure of Conoco's purchases had *de minimis* consequences and could not support a finding of a Section 7 violation or antitrust injury. (Pet. App. A19-A26.) Finally, the court of appeals affirmed the district court's grant of summary judgment on petitioners' claims for equitable relief. (*Id.* at A26.)

## ARGUMENT

In considering petitioners' Section 7 challenge to Du Pont's 1981 acquisition of Conoco, the court of appeals correctly applied well-established legal principles to the unique theories of injury put forward by petitioners. The court's decision does not conflict with any decision of this Court or that of any court of appeals, and its holding is unlikely to have any application beyond this particular case. Review by this Court is therefore unwarranted.

1. The court of appeals rejected as a basis for relief petitioners' claim that they had been injured by the Du Pont-Conoco acquisition as a result of the alleged termination of Conoco's plans to build demand for methanol in preparation for entering the methanol business as a producer. The court concluded that petitioners' "demand creation" theory—that in the absence of the acquisition Conoco would have taken steps to increase the demand for

methanol, resulting in a shortage, higher prices and increased sales and, therefore, greater profits for methanol producers such as petitioners—did not satisfy the requirement of antitrust injury set out in this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The court of appeals also rejected petitioners' "vertical" claim, concluding that Conoco had purchased such a small amount of methanol that the foreclosure resulting from the acquisition—less than 1 percent of the merchant market—was *de minimis*. Citing this Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), and subsequent decisions of the lower courts, the court below held that such a small foreclosure could not form the basis for a finding of either an antitrust violation or the requisite injury.

The court of appeals did not break new legal ground. Rather, it merely applied familiar antitrust principles developed by this Court to the theories contrived by petitioners. Indeed, the dissenting judge in his opinion expressly noted his agreement with the legal principles stated by the majority; his disagreement was only with the majority's application of those principles to petitioners' claims. (Pet. App. A27.)

It is doubtful that there will ever be another case raising the types of claims that were at issue below. Petitioners' only theory of injury in support of their claim for damages was their "demand creation" theory.[10]

---

[10] Petitioners' demand creation theory was at the heart of both their "horizontal" claim and their "vertical" claim. In describing their vertical claim (Pet. 4, 14-15, 26-28) petitioners stress the hypothetical increase in Conoco's purchases that supposedly would have accompanied its demand stimulation activities.

The court of appeals confined its discussion of petitioners' vertical claim to the foreclosure of methanol purchases Conoco actually was making at the time it was acquired by Du Pont. (See page 14, *infra*.) In view of the small percentages involved and the court's reliance on the specific circumstances of this case, it is un-

That theory is highly specific to the facts of this case. According to petitioners, had Conoco (the owner of extensive coal reserves) not been acquired by Du Pont it would have carried out a plan to build a huge coal-to-methanol plant. During the period of six or eight years it would take to build the plant, Conoco allegedly would have engaged in a massive methanol purchasing campaign to enable it to promote new fuel uses of methanol, which in turn, it is claimed, would have led others to engage in a methanol buying spree. The resulting increase in demand for methanol allegedly would not have been met by existing supplies and would have created a shortage of methanol in the near term. Petitioners claim the result would have been to push up the methanol price sharply, allowing existing producers (including petitioners) to realize far greater profits than they in fact did realize in the period following the acquisition. In view of the highly fact-bound (and far-fetched) nature of the scenario petitioners advance, we doubt very much that any plaintiff will raise such a theory in the future.

2. In any event, the decision below is clearly correct.

a. Petitioners argue (Pet. 12-20) that the court of appeals erred in holding that their "demand creation" theory of injury failed to meet the requirement of *antitrust* injury defined in this Court's *Brunswick* case. They contend that *Brunswick* has no application to the

---

likely that its holding on the vertical claim will have any significant effect on other cases. In any event, petitioners do not challenge the court's disposition of vertical issues. They object only to the fact that the court did not also consider hypothetical purchases by Conoco.

The court of appeals' holding with respect to petitioners' claim for equitable relief likewise will not affect other cases. The court's opinion contained no extended discussion of that claim, but merely referred back to its treatment of injury in connection with petitioners' damages claims.

theory they advance, and that in any event language from *Brunswick* does not preclude them from proving damages based on that theory.

This Court held in *Brunswick* that an antitrust plaintiff "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489 (emphasis in original). The Court noted that it would be "inimical" to the goals of the antitrust laws to award damages for injury suffered from an enhancement of competition. *Id.* at 488. In any event, antitrust injury does not include injury to which the antitrust laws are "merely indifferent." *Ibid.* Moreover, in the Court's view, it was "far from clear" that a "loss of windfall profits," such as the *Brunswick* plaintiffs alleged, even constituted "injury" within the meaning of Section 4 of the Clayton Act. *Ibid.*

The injury alleged by petitioners does not "flow[] from that which makes [respondents'] acts unlawful." If the Du Pont-Conoco acquisition were held to be illegal because of its effect on the methanol business, it would be because it prevented Conoco from entering the business as an independent competitor and thereby diminished the prospects for long-term deconcentration of an oligopolistic market. See, *e.g.*, *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 625 (1974). Petitioners' "demand creation" theory is concerned with something quite different—profits petitioners allegedly would have made as a result of Conoco's stimulation of methanol demand and creation of a shortage in the period *before* it entered as an independent competitor. That injury is not related to the alleged illegality. Under petitioners' scenario, they could have earned such profits even with the acquisition had the combined Du Pont-Conoco elected to go forward with a coal-based methanol plant, accompanied by pre-production demand stimulation activities.

Moreover, the injury claimed is surely not "of the type the antitrust laws were intended to prevent." Despite their protestations to the contrary, petitioners appear at bottom to be complaining about *increased* competition. Since the Du Pont-Conoco acquisition, the methanol business has experienced excess supply and low prices—in other words, highly competitive conditions. Petitioners would have preferred a market in which Conoco's actions led to a surge in demand and a shortage of supply, accompanied by a sharply higher price on a near-term basis. The court of appeals correctly recognized that such a development would have proved "distinctly disadvantageous" to consumers. (Pet. App. A18.) As the district court noted, under petitioners' theory Conoco's actions would have allowed methanol sellers "to hike their prices" without attracting additional methanol supplies that in turn would have brought the price down. (*Id.* at B11-B12.) Petitioners' alleged injury rests on their claim that the acquisition prevented the development of such a market situation and deprived them of the elevated profits they otherwise would have earned. Awarding damages for such injury would certainly be "inimical" to the goals of the antitrust laws.

In any event, the antitrust laws are at least "indifferent" to the injury petitioners claim. Those laws were enacted for the purpose of preserving and enhancing competition, not for the purpose of encouraging providential stimulation of demand or to enable producers to benefit from shortage of supply with resulting higher prices and windfall profits.[11]

---

[11] Petitioners' claim is clearly one for "windfall profits." As the court of appeals recognized, the claim is "not for a reduction of [their] existing sales base but the denial of an increase." (Pet. App. A17.) The court of appeals correctly noted (*id.* at A18) that there is no authority for the proposition that the antitrust laws impose on a producer an affirmative duty to expand markets.

b. Petitioners also contend (Pet. 21-26) that the court of appeals erred in holding that they were not entitled to the equitable relief they sought (including divestiture of Conoco by Du Pont). That contention lacks merit. The court of appeals correctly concluded that petitioners could not demonstrate the requisite threat of antitrust injury to support their claim.

In *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 107 S. Ct. 484 (1986), this Court held that the requirement of antitrust injury applies to actions for injunctive relief under Section 16 of the Clayton Act, as well as to actions for damages under Section 4 of the Act. Since petitioners' claim of loss of windfall profits from sales at elevated prices induced by Conoco's supposed pre-production activities does not satisfy the requirement of antitrust injury for purposes of Section 4, it cannot support a claim for injunctive relief under Section 16.

Petitioners assert that their claim that the Du Pont-Conoco acquisition enhanced Du Pont's alleged "dominance" in the methanol business is a sufficient basis for injunctive relief. They argue that Conoco's entry as a new methanol competitor would have resulted in a decrease of Du Pont's "dominance."

There are several difficulties with petitioners' theory. First and most glaring, petitioners would have been harmed, not helped, by the entry of Conoco as an independent producer. If Conoco had opened a large coal-based methanol plant the effect necessarily would have been to drive down the price of methanol, thus lowering the profit margins of existing producers such as petitioners. By the same token, if the Du Pont-Conoco acquisition in fact did lessen competition in the methanol business by preventing Conoco's independent entry, existing producers (such as petitioners) should have benefited. The court of appeals aptly termed it "curious" that petitioners would assert a loss on the basis of conduct that

allegedly reduced the number of suppliers in the marketplace. (Pet. App. A18.)

Moreover, it is clear that Du Pont enjoys no such dominance in the methanol business as would conceivably entitle petitioners to injunctive relief. In his deposition petitioners' top marketing official testified that petitioners have been able in the years since the acquisition to sell all the methanol they wished at prevailing market prices. (C.A. App. A7899.) Further, as a result of depressed conditions in the methanol business since the acquisition, Du Pont has transferred a part of its methanol-production capacity and disbanded its methanol sales organization; it does not produce methanol for sale to outside customers but produces only for its own internal needs. (*Id.* at A140-A145.) In the meantime, petitioners' sales to United States customers more than doubled, and by May 1985 petitioners' top marketing official was describing AGCL as "probably the largest merchant marketer [of methanol] in the world." (*Id.* at A3214, A7904-A7905; Pet. App. A23-A24.)

Petitioners assert (Pet. 11, 25-26) that the court of appeals' decision will have the effect of denying a competitor standing to seek injunctive relief in connection with the illegal merger of two of its competitors. That is clearly not the case. The court of appeals held only that *petitioners* had not alleged the sort of injury that would entitle them to injunctive relief. It did not in any way suggest that a competitor would be precluded from challenging a merger in all circumstances.[12]

---

[12] The court of appeals could hardly have made such a suggestion in light of this Court's observation in *Cargill*, 107 S. Ct. at 495, that proof that an acquisition would lead to predatory pricing might in some cases satisfy the antitrust injury requirement. Petitioners freely admit that they made no predatory pricing allegations in this case. (Pet. App. 22 n.15.)

Petitioners contend (Pet. 10-11 & n.8) that the decision below conflicts directly with two court of appeals decisions involving the

c. Petitioners claimed that by acquiring Conoco Du Pont foreclosed the opportunity for sales of methanol to Conoco by other methanol competitors. They argue in connection with their third question presented (Pet. 26-28) that the court of appeals should have considered their demand creation theory in connection with their foreclosure claim. However, that theory of injury fares no better when dressed up as a vertical claim than as part of petitioners' horizontal claim. Petitioners cannot evade the requirement of *antitrust* injury merely by relabeling their claim.

In any event, a claim based on hypothetical sales to Conoco is not a vertical claim at all. We are aware of no case in which a court has found foreclosure, and on that basis condemned a vertical merger, where what was claimed was foreclosure of sales that were never actually to be made and from which the acquiring company would not benefit.

3. Even if the court of appeals' present decision were set aside, it would not affect the outcome of this case. The dissenting judge in the court of appeals observed that petitioners' theory of the case was "not the most believable story about the conduct of rational actors in

---

standing of competitors to challenge horizontal mergers, Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404 (1st Cir. 1985), and Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354 (6th Cir.), *cert. dismissed*, 469 U.S. 1200 (1985). There is no conflict. In neither *Cia. Petrolera* nor *Christian Schmidt* did the plaintiff allege any "demand creation" theory of the type urged by petitioners below. Nor did a competitor in those cases assert that it would have benefited from the entry of a new competitor into the relevant market. Both cases are therefore clearly distinguishable from this case. Moreover, both cases were decided prior to this Court's decision in *Cargill*; it is unclear whether they would be decided in the same manner today. (Contrary to petitioners' assertion at Pet. 24, the Court in *Cargill*, 107 S. Ct. at 490 & n.7, did not hold that there had been sufficient allegations of injury in the *Christian Schmidt* case.)

the marketplace." (Pet. App. A28.) He noted that he would have been sympathetic to a grant of summary judgment against petitioners on the ground that they had not put forward enough evidence to take their case to the jury. (*Id.* at A28, A45.)[13]

There are many dubious links in petitioners' chain. Their "demand creation" scenario included, *inter alia*, the following alleged occurrences: (1) that Conoco would have proceeded with a coal-based methanol plant in a period when oil prices were declining, a persistent oversupply of methanol was developing, and all other companies that had expressed interest in building such plants on a large scale failed to do so; (2) that Conoco would have begun massive demand stimulation efforts more than five years before its plant was scheduled to begin production; (3) that, beginning in 1982, Conoco alone could have stimulated an additional 200 million gallons of annual methanol demand (primarily for new fuel uses) at selling prices around 15 cents per gallon higher than prices that have actually prevailed, despite the fact that existing producers have been unable to stimulate such new demand and that large amounts of unused production capacity would have been available to satisfy any increase in demand; and (4) that the gain to petitioners from Conoco's alleged pre-production, demand stimulation efforts would have outweighed the loss to them from the eventual addition of hundreds of millions of gallons of new Conoco production, which would have depressed prices and/or deprived petitioners of market share.

As we argued in our *in limine* motion in the district court, we believe that a jury asked to determine whether injury had occurred on the basis of this scenario would be impermissibly asked to speculate, not to make a rea-

---

[13] Compare Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1361 (1986) (alleged scheme made "no practical sense").

soned inference from the facts.[14] The dissenting judge correctly recognized that this would have been a sufficient independent ground for dismissal of petitioners' claim.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

*Of Counsel*
RICHARD H. REA
BERNARD J. REILLY
E. I. du Pont de Nemours & Company
Tenth & Market Streets
Wilmington, Delaware 19898
(302) 774-2117

MARJORIE A. WILHELM
Conoco Inc.
5 Greenway Plaza East
P.O. Box 2197
Houston, Texas 77001
(713) 293-3400

DANIEL M. GRIBBON *
HENRY P. SAILER
WILLIAM H. ALLEN
CAROLYN F. CORWIN
DOUGLAS R. DAVIES
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

THOMAS L. MORRISSEY
JOHN P. DWYER
Carpenter, Bennett & Morrissey
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(201) 622-7711

*Counsel for Respondents*

* Counsel of Record

November 1987

---

[14] The district court did not reach this argument in ruling on our motion.